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No. 88-1901

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

DELTA AIR LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether an arbitration award directing a commercial airline to reinstate a pilot who was discharged for having flown a passenger-carrying aircraft while drunk was properly set aside as contrary to public policy.

2. Whether an arbitration award directing a commercial airline to reinstate a pilot who was discharged for having flown a passenger-carrying aircraft while drunk conforms with and confines itself to matters within the jurisdiction of the arbitrator by relying on a post-discharge diagnosis of alcoholism as its basis.

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit appear in the caption of the case in this Court.[1]

[1] Pursuant to Supreme Court Rule 28, the following is a listing of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Delta Air Lines, Inc.: Atlantic Southeast Airlines, Inc.; Comair, Inc.; and Gatwick Handling, Ltd.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, Delta Air Lines, Inc., respectfully urges denial of the Petition for a Writ of Certiorari filed by the Air Line Pilots Association, International ("ALPA") to review the judgment and order entered by the United States Court of Appeals for the Eleventh Circuit on December 8, 1988.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES AND REGULATIONS INVOLVED

Certain provisions of the Railway Labor Act, 45 U.S.C. § 153 and § 184, and of the Federal Aviation Regulations, 14 C.F.R. § 91.11(a), are involved in this case. Those provisions are set forth at pp. 81a to 93a of the Appendix to the Petition.

Additionally, the Federal Aviation Act, 49 U.S.C. § 1421(b), provides that:

> In prescribing standards, rules and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce; and he shall make classifications of such standards, rules, regulations, and certificates appropriate to the differences between air transportation and other air commerce. The Administrator may authorize any aircraft, aircraft engine, propeller, or appliance, for which an aircraft certificate authorizing use thereof in air transportation has been issued, to be used in other air commerce without the issuance of a further certificate. The Administrator shall exercise and perform his powers and duties under this chapter in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation, but shall not deem himself required to give preference to either air transportation or other air com-

merce in the administration and enforcement of this subchapter.

STATEMENT OF THE CASE

I. The Relevant Facts

Around 2:00 p.m., on January 9, 1985, William Douglas Day, a Delta Captain, arrived in Bangor, Maine, where he had a scheduled layover before he was to serve as the Pilot-In-Command of Delta Flight 437 to Boston at 7:05 a.m. the next morning. During that layover, Day drank unknown quantities of scotch whiskey, as well as wine and beer, and became extremely intoxicated. Day has no idea how much alcohol he drank nor does he know when he stopped drinking, though he admits to drinking scotch until at least 12:30 a.m.

Just prior to the scheduled departure, Day arrived at the airport. He needed the assistance of his first officer just to be able to board the aircraft. Witnesses described his appearance as "frightening." His eyes were glazed, his face was red and swollen, and he smelled very strongly of alcohol. Only with the help of others was he able to enter the cockpit.

Flight attendants reported being alarmed that Day was in the cockpit, obviously drunk. Their objections to having a drunk flying the plane, however, went unheeded. During the flight, at least one passenger voiced his concern about Day's condition and told a flight attendant that, "if you don't take care of it, I will."

When the flight attendants continued to express their concerns over Day's condition, the Cockpit Voice Recorder was deliberately disconnected while the crew

discussed the situation. Day, the final authority as to the operation of the aircraft as its Pilot-In-Command, was aware that the Cockpit Voice Recorder had been disconnected and that that was a serious violation of the Federal Aviation Regulations. At all times throughout the flight, Day served as the Pilot-In-Command, personally manipulating the controls.

After arriving in Boston, the flight attendants as well as one of the passengers reported to Delta management that the Captain was drunk. Day and the first and second officers were directed to submit to a blood-alcohol test. While the blood tests administered to the first and second officers were both negative, the results of Day's test indicated a blood alcohol content of around .13 grams percent alcohol at the time he piloted Flight 437. Based on his violations of Delta Flight Operations Procedures and the Federal Aviation Regulations by operating the aircraft while intoxicated, Day was terminated on January 15, 1985.

At no time prior to his discharge did Day suggest that he might have an alcohol problem. Only after Delta had denied a grievance filed on his behalf did Day decide to seek a diagnosis that could be presented at the subsequent arbitration hearing.

Following a hearing in January, 1986, the Delta Air Lines Pilots' System Board of Adjustment issued its decision, finding that Day had indeed operated the aircraft while intoxicated. Although declaring that he had thereby committed a "dischargeable offense," a majority of the System Board, in a 3 to 2 opinion, ruled that Day should have been offered the option of entering the Delta alcohol rehabilitation program, instead of being terminated. In so ruling, the majority

noted that Day's first and second officers were only suspended, not discharged, and that, on three previous occasions, crew members under the influence of alcohol had been intercepted prior to reporting to the aircraft and were not dismissed. The two dissenting System Board members determined that Delta had just cause to terminate Day's employment.

The majority of the System Board awarded Day reinstatement without backpay. Delta was directed to reimburse Day for the costs of his alcohol rehabilitation program and "to cooperate with [Day] and with the Federal Aviation Administration in relation to the procedures . . . whereby [Day] may be granted special issuance of a first-class airman medical certificate."

II. The Proceedings Below

On February 12, 1987, Delta filed a complaint in the United States District Court for the Northern District of Georgia, seeking to have the arbitration award set aside. In partially granting Delta's summary judgment motion, that Court found that enforcement of the award directing Day's reinstatement would violate the clearly established public policy against allowing pilots to operate aircraft under the influence of alcohol. That well-defined and dominant policy was codified in Federal Aviation Regulations and elsewhere, and the public safety implications resulting from a violation of that policy were enormous. Accordingly, those portions of the award directing Day's reinstatement and requiring Delta to cooperate in his attempt to secure licensing from the FAA were vacated. The portion of the award ordering Delta to reimburse Day's costs in seeking rehabilitation did not contravene public policy, and, though the Court found it inconceivable that he should be entitled to parti-

cipate in Delta's alcohol rehabilitation program without having requested to enter that program, enforcement of that portion of the decision was granted.

On December 8, 1988, the Court of Appeals for the Eleventh Circuit affirmed. After reviewing specific statutory prohibitions against operating aircraft while under the influence of alcohol from 40 different states as well as federal regulations and applicable case law, the Court determined that there was a vital public policy against flying while intoxicated. Day's job performance endangering the lives of his passengers and crew offended that public policy, and Delta had a duty to prevent such conduct. The arbitration award interpreting the collective bargaining agreement between Delta and ALPA as authorizing pilots to fly while intoxicated conflicted with public policy and was unenforceable. In dicta, the Court also noted that the System Board was responsible only for determining whether Delta had just cause to terminate Day's employment, not whether his subsequent diagnosis as an alcoholic and his participation in a rehabilitation program rendered him fit for rehire. Public policy, however, did not forbid requiring that Day be reimbursed for the expenses incurred in connection with his rehabilitation, and the enforcement of that aspect of the arbitration award was therefore affirmed.

A petition for rehearing and rehearing en banc was denied on January 23, 1989.

REASONS FOR DENYING THE WRIT

The statutory and regulatory framework under which air carriers and their pilots function makes this case unique insofar as the public policy exception to

the enforcement of arbitration awards is concerned. Unlike employers in other industries whose employment relationships are governed strictly by collective bargaining agreements, Delta has a statutory obligation "to perform [its] services with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b). In order to fulfill that obligation, a carrier must determine "the competency of its pilots in the interests of public safety taking into account such things as '*personal characteristics that could adversely affect safety.*' " *World Airways, Inc. v. International Brotherhood of Teamsters*, 578 F.2d 800, 803 (9th Cir. 1978) (quoting 14 C.F.R. § 121.413(a)(4)(ii)). In view of the responsibility imposed by federal law on air carriers to assess the abilities of particular pilots in order to ensure air safety, this is not an appropriate case for resolution of any conflicts that may exist concerning the scope of review of labor arbitration awards in other contexts.

I. The Court Below Properly Applied *Misco*

Less than two years ago, in *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), this Court addressed the nature of the public policy exception to the enforcement of arbitration awards, and this same issue does not warrant further review. Before an award can be overturned, *Misco* reconfirmed that public policy must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co. v. Local 759, International Union of United Rubber Workers*, 461 U.S. 757, 766 (1983) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)). The decision of the Eleventh Circuit fully satisfies this requirement.

Rather than simply formulating its own notions of what public policy regarding air transportation ought to be, the Court below exhaustively examined existing statutes, regulations and case law in determining that a well defined and dominant policy existed forbidding piloting an aircraft while intoxicated. Forty states have passed legislation expressly prohibiting flying under the influence of alcohol, and others have outlawed reckless or dangerous flying. Criminal sanctions have been imposed in a number of reported cases against pilots found guilty of flying while intoxicated, and other decisions indicate that jeopardizing the lives of passengers and crewmembers by operating an aircraft while drunk offends public policy. As the authorities were unanimous in condemning flying under the influence of alcohol, the Eleventh Circuit, in accordance with the directives of *Misco*, found an "explicit," "well defined and dominant" public policy precluding enforcement of the arbitration award.

The only decision indicating that operating an aircraft while intoxicated is somehow consistent with public policy, *Northwest Airlines, Inc. v. Air Line Pilots Association, International*, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, ___U.S. ___ , 108 S. Ct. 1751 (1988), predates *Misco*. That Court has not had an opportunity to reexamine the scope of the public policy exception in light of *Misco*, and its reconsideration of the issue may well eliminate any conflict among the courts.

II. The Decision Of The Court Below Does Not Conflict With Post-*Misco* Cases From Other Circuits

In determining that the portion of the System Board award mandating Day's reinstatement was unenforceable, the Eleventh Circuit carefully considered and

distinguished *Misco*. *Misco* involved an employee discovered with marijuana in his car, and his wrongdoing was not directly related to the performance of employment activities. Here, on the other hand, Day performed his job functions in a manner violative of clear and explicit laws. Requiring Delta to acquiesce in that malperformance by reinstating Day to his former position as a Pilot-In-Command was therefore contrary to public policy.

The post-*Misco* decisions from other circuits conform with this approach. Thus, an arbitration award directing the reinstatement of an employee at a federally-licensed nuclear power plant who had been discharged for defusing the interlock door system at the plant in order to go to lunch was unenforceable in *Iowa Electric Light & Power Co. v. Local Union 204, International Brotherhood of Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987), while an employee who fired a gun at an empty car while off-duty had not engaged in wrongful conduct in connection with the performance of his job in *United States Postal Service v. National Association of Letter Carriers*, 839 F.2d 146 (3d Cir. 1988). Similarly, even prior to *Misco*, both the postal worker guilty of embezzling postal funds in *United States Postal Service v. American Postal Workers Union, AFL-CIO*, 736 F.2d 822 (1st Cir. 1984), and the over-the-road truck driver who was drinking on the job in *Amalgamated Meat Cutters and Butcher Workmen of North America v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), committed serious criminal activities while performing their employment duties, and arbitration awards ordering their reinstatement were therefore unenforceable.

ALPA's suggestion that the Eleventh Circuit standard could authorize overturning an award reinstating a deliveryman who gets a parking ticket or any employee cited for some minor indiscretion while working is both erroneous and absurd. Only in those rare instances where an employee has committed truly egregious acts in performing his job is public policy offended by a reinstatement order. A commercial airline pilot who risked the lives of his passengers and crew by flying while drunk has engaged in the exceptional sort of outrageous behavior that offends public policy and mandates overturning the System Board award.

III. The Unique Factual Issue Created By The Arbitration Award Does Not Merit Review By This Court

By declaring that Day had committed "a dischargeable offense," the System Board satisfied its sole responsibility, determining whether Delta had just cause to terminate his employment after he had flown while drunk. Instead of resolving the dispute on that basis, however, the System Board considered Day's subsequent diagnosis and treatment for alcoholism to establish that Delta had somehow breached its collective bargaining agreement by failing to offer Day alcohol rehabilitation at the time of his discharge.

Nothing in the collective bargaining agreement the arbitrator was supposed to be interpreting created any right to treatment for alcohol-related problems. While, as ALPA notes, an arbitrator may consider evidence which mitigates against the decision of management to impose discharge as the appropriate discipline for employee misconduct, he cannot use postdischarge evidence unrelated to his function to second-guess that decision. Contrary to ALPA's sug-

gestion, nothing in *Misco* authorizes an arbitrator to expand upon the authority conferred on him by the parties by resolving issues not presented to him. Though an arbitrator is free to make evidentiary rulings without judicial review, he cannot consider matters which the parties have not agreed to have determined through arbitration.

In any event, the decision of the Court below concerning the authority of the System Board to determine whether Delta should somehow have foreseen that Day would be diagnosed to be an alcoholic and seek rehabilitation after the grievance process had been invoked is little more than dicta concerning an incidental issue in the case. The unique factual situation created by the confusing language used in the arbitration award limits any potential impact in the resolution of this question to the litigants in this action, and the Petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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